

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 DEBRA L. LAINE,

No. C 13-04109 SI

12 Plaintiff,

13 v.

14 WELLS FARGO BANK, N.A.,

15 Defendant.

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS THE FIRST
AMENDED COMPLAINT WITH LEAVE
TO AMEND**

17 Defendant's motion to dismiss the first amended complaint is scheduled for a hearing on
18 February 28, 2014. Pursuant to Civil Local Rule 7-1(b), the Court determines that this matter is
19 appropriate for resolution without oral argument and VACATES the hearing. For the reasons set forth
20 below, the motion is GRANTED and plaintiff is granted limited leave to amend in accordance with this
21 order. If plaintiff wishes to amend her complaint, she must do so by **March 13, 2014**.

22
23 **BACKGROUND**

24 In June 2004, plaintiff and her former husband obtained a loan from World Savings Bank, FSB
25 in the amount of \$361,000. The loan was secured by a deed of trust against real property located at 5450
26 Betty Circle, Livermore, California. Docket No. 2, Ex. 3. On December 31, 2007, World Savings Bank,
27 FSB changed its name to Wachovia Mortgage, FSB. *Id.*, Ex. 4 at 2. In April 2009, plaintiff and her
28 former husband received a loan modification from Wachovia Mortgage, FSB. Docket No. 18, Ex. A.

1 In November 2009, Wachovia Mortgage, FSB changed its name to Wells Fargo Bank Southwest, N.A.,
2 before merging with Wells Fargo Bank, N.A. Docket No. 2, Ex. 4 at 7.

3 In late 2012, plaintiff and her husband decided to divorce. First Amend. Compl. (“FAC”) ¶ 15.
4 The complaint does not state when the divorce became final, but does allege that plaintiff’s former
5 husband gave plaintiff an Interspousal Transfer Deed for the subject property, and that the deed was
6 recorded on March 1, 2013 in Alameda County. *Id.* According to the FAC, sometime in 2012 plaintiff’s
7 former husband lost his job and he could not help pay the mortgage payments or legal bills incurred as
8 a result of the divorce. *Id.* The complaint also alleges that when plaintiff’s husband lost his job, plaintiff
9 lost her medical insurance. *Id.* ¶ 16. The FAC alleges that “[p]laintiff’s increased medical bills and
10 attorney bills caused her to default on her loan payments in about November of 2012.” *Id.* ¶ 17.

11 Plaintiff failed to make her November 2012 payment, and the complaint alleges that in that same
12 month “plaintiff began working with Josh Reeves, Home Preservation Specialist, Wells Fargo Home
13 Mortgage to modify her loan. However, Mr. Reeves told plaintiff that the loan modification could not
14 proceed until plaintiff could provide proof of her divorce.” *Id.* ¶ 18. The complaint does not state
15 whether or when plaintiff provided Wells Fargo with proof of her divorce, or whether plaintiff in fact
16 applied for a loan modification in November 2012.

17 The FAC alleges that in January and February of 2013, plaintiff made two house payments, but
18 then missed several more mortgage payments because her medical creditors were threatening to take
19 action against her. *Id.* ¶ 19. On May 28, 2013, a Substitution of Trustee was recorded substituting
20 Regional Services Corporation as the Trustee under the Deed of Trust. Docket No. 2, Ex. 7. The
21 Substitution of Trustee states that World Savings Bank, FSB, its successors and/or assignees was the
22 original beneficiary under the Deed of Trust and that Wells Fargo Bank, N.A. was the current
23 beneficiary. *Id.* That same day, Regional Services Corporation recorded a Notice of Default, stating that
24 plaintiff owed \$14,043.14 in arrears. *Id.*, Ex. 8. The complaint alleges that on that same day, plaintiff
25 “attempted to again start a loan modification” but that a Wells Fargo representative named “Roberto”
26 informed told her that Wells Fargo would not start the modification process because plaintiff did not yet
27 have her divorce decree. FAC. ¶ 22.

28

1 On June 3, 2013, plaintiff sent Wells Fargo a mortgage payment. *Id.* ¶ 23. On June 7, 2013, Wells
2 Fargo sent plaintiff a letter stating it was returning plaintiff's check because the amount of the payment
3 was less than the amount required to bring the loan current. *Id.* On June 12, 2013, plaintiff spoke to
4 Roberto again about applying for a loan modification, and Roberto again informed her that plaintiff
5 needed proof of her divorce in order to apply for the modification. *Id.* ¶ 24.

6 Plaintiff alleges that on June 14, 2013, she sent Wells Fargo Home Mortgage "a Qualified Written
7 Request" pursuant to 12 U.S.C. § 2605 of the Real Estate Settlement Procedures Act ("RESPA") and Cal.
8 Civ. Code § 2913.55 and § 2913.55. *Id.* ¶ 25 & Docket No. 2, Ex. 10. In her FAC, plaintiff alleges that
9 she "asked for specific information including: 4) A copy of my payment history since I was last less than
10 60 days past due. 5) A written itemization of the entire amount I must pay to bring my loan out of default.
11 and 6) A written itemization of the unpaid principal for my loan." Docket No. 2, Ex. 10; FAC ¶ 25.

12 Wells Fargo responded to plaintiff in a letter dated June 24, 2013. Docket No. 2, Ex. 1. Wells
13 Fargo enclosed a copy of the Note and Deed of Trust with the June 24, 2013 letter, and the letter stated
14 that a complete loan history would follow under separate cover. *Id.* The letter also stated that "any
15 documents or information not provided in this letter is due to the request being too broad to determine
16 specific information needed, or are considered to be proprietary information of Wells Fargo Home
17 Mortgage and will not be provided at this time without a subpoena." *Id.* The letter included a telephone
18 number plaintiff could call to reach the foreclosure department. *Id.*

19 In July of 2013, plaintiff began the process of applying for a loan modification. FAC. ¶¶ 29-30.
20 On or about August 17, 2013, plaintiff faxed Wells Fargo her application for a loan modification. *Id.*
21 ¶ 33. Several days later, plaintiff faxed her application a second time because Wells Fargo stated it had
22 not received the entire application. *Id.* ¶¶ 34-36. Wells Fargo then told plaintiff that it needed additional
23 information in order to process her application. *Id.* ¶¶ 36, 40, 42. The complaint alleges that plaintiff
24 provided the additional information on August 28, 2013, September 3, 2013, and September 4, 2013.
25 *Id.* ¶¶ 37, 41, 43. On October 18, 2013, Wells Fargo sent plaintiff a letter stating that they were unable
26 to modify the mortgage, and that absent a successful appeal the foreclosure process would move forward.
27 *Id.* ¶ 47.

28

1 Plaintiff filed this lawsuit *in proper* on September 5, 2013. The original complaint alleged claims
2 for fraud, negligence, unfair business practices, negligent and intentional infliction of emotional distress,
3 and violations of RESPA, the California Home Owner's Bill of Rights, and Cal. Civ. Code §§ 1511 and
4 1512. The complaint alleged that Wells Fargo did not have the right to foreclose on the subject property
5 because World Savings Bank, FSB was the true holder of the note. The complaint also alleged that Wells
6 Fargo did not provide all of the information that plaintiff requested in her Qualified Written Request, and
7 that because Wells Fargo did not provide the information, plaintiff lost an opportunity with a "private
8 investor who wanted to take a second position on the loan and take it out of default and to provide
9 plaintiff with \$50,000." Compl. ¶ 78. On November 14, 2013, the Court denied plaintiff's motion for
10 a temporary restraining order and/or preliminary injunction, and granted defendant's motion to dismiss
11 the complaint with leave to amend. With respect to the RESPA claim, the Court directed plaintiff to
12 specify what information Wells Fargo did not provide in response to her request, and allege how the
13 failure to provide the information under RESPA led to the private investor not taking a second position
14 on the loan. Docket No. 27 at 11-12.

15 On December 23, 2013, plaintiff filed her first amended complaint. On January 6, 2014, the Court
16 denied plaintiff's second motion for a temporary restraining order and/or preliminary injunction, and on
17 January 9, 2014, the Court denied plaintiff's third motion for a temporary restraining order and/or
18 preliminary injunction.

19 The allegations in the FAC center around defendant's allegedly inadequate response to plaintiff's
20 Qualified Written Request. Plaintiff alleges that defendant's failure to provide her with the "written
21 itemization" needed to bring her loan out of default and the "written itemization" of the unpaid principal
22 on her loan caused her to lose an opportunity with a "private investor who wanted to take a second
23 position on the loan and take it out of default and to provide plaintiff with \$50,000." *Id.* ¶¶ 66-67. The
24 FAC alleges that "[b]ut for Wells Fargo's failure to provide plaintiff with the amount needed to bring her
25 loan out of default and the amount of unpaid principal for her loan, plaintiff would have received a
26 \$50,000 loan that would have allowed her to bring her loan out of default and prevent the loss of the
27 remaining \$50,000 in equity in her home." *Id.* ¶ 66. The FAC alleges claims for violations of RESPA,
28 fraud, negligence, intentional infliction of emotional distress and unfair competition.

LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the plaintiff to allege facts that add up to “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). While courts do not require “heightened fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 544, 555. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

In reviewing a Rule 12(b)(6) motion, a district court must accept as true all facts alleged in the complaint, and draw all reasonable inferences in favor of the plaintiff. *See al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009). However, a district court is not required to accept as true “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

Pro se complaints are held to “less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Where a plaintiff is proceeding *pro se*, the Court has an obligation to construe the pleadings liberally and to afford the plaintiff the benefit of any doubt. *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc). However, *pro se* pleadings must still allege facts sufficient to allow a reviewing court to determine whether a claim has been stated. *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

If the Court dismisses a complaint, it must decide whether to grant leave to amend. The Ninth Circuit has “repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation marks omitted).

DISCUSSION

2 I. Real Estate Settlement Procedures Act

3 Plaintiff alleges a claim for violation of the Real Estate Settlement Procedures Act, 12 U.S.C.
4 § 2605. Plaintiff alleges that she sent defendant a valid Qualified Written Request (“QWR”), defendant
5 did not adequately respond, and as a result she lost the opportunity to obtain a \$50,000 loan from a
6 private investor. Docket No. 41, FAC ¶¶ 58-75. Defendant contends, *inter alia*, that plaintiff does not
7 plead any actual pecuniary damages as a result of the RESPA violation.

8 RESPA requires servicers of a federally related mortgage loans to provide timely written
9 responses to inquiries from their borrowers regarding the servicing of their loans. 12 U.S.C.
10 § 2605(e)(1)(A), (e)(2). Section 2605 requires servicers to “either provide the information to the
11 borrower or explain why such information is not available.” 12 U.S.C. § 2605(e)(2). A plaintiff who
12 alleges a violation of section 2605 must also allege actual pecuniary damages. *Tamburri v. Suntrust*
13 *Mortg. Inc.*, 875 F. Supp. 2d 1009, 1014 (N.D. Cal. 2012). Specifically, the plaintiff must allege a causal
14 connection between the RESPA violation and the pecuniary damages. *See id.* at 1015; *Guidi v. Paul*
15 *Fin., LLC*, 13-CV-01919-LHK, 2014 WL 6025, at *4 (N.D. Cal. Jan. 7, 2014). A borrower who proves
16 these elements is entitled to recover the actual damages and, if there is a “pattern or practice of
17 noncompliance,” statutory damages of up to \$2,000. 12 U.S.C. § 2605(f).

18 The Court concludes that plaintiff does not sufficiently allege a causal connection between the
19 alleged RESPA violation and her pecuniary damages.¹ Plaintiff alleges that she had an agreement with
20 a private investor who wanted to provide plaintiff with a \$50,000 loan and that “[b]ecause Wells Fargo
21 did not provide the amount to bring her loan out of default and the amount of unpaid principal on the
22 loan, the private investor did not take a second position on the loan and plaintiff lost the \$50,000 loan.”
23 Docket No. 41, FAC ¶ 66. However, the alleged section 2605 violation concerns the failure to provide
24 the written itemizations and the loan history. As Wells Fargo notes, the FAC alleges that Wells Fargo
25 sent plaintiff the May 28, 2013 Notice of Default, which provided the amount required to bring the loan
26 out of default, as well as the August 29, 2013 Notice of Trustee’s Sale, which provided the total amount

¹ Accordingly, the Court does not reach defendant's other arguments regarding dismissal of the RESPA claim.

1 due on the loan. FAC ¶¶ 21, 38; *see also* Docket No. 2 Ex. 8, at 1; Docket No. 2, Ex. 9, at 1. The FAC
2 does not explain why this information was insufficient for the private investor, nor does plaintiff allege
3 why the private investor needed the particular information she requested in her June 13, 2013 letter – the
4 written itemizations and the loan history – before providing the loan. Thus, in order to plead a plausible
5 RESPA claim, plaintiff must specify how the harm she allegedly experienced – the loss of the \$50,000
6 loan – flowed from defendant’s alleged failure to provide the loan history and the written itemizations,
7 in light of the fact that plaintiff possessed information about the total amount required to bring her loan
8 out of default and the amount of unpaid principal on her loan.

9 Plaintiff also alleges that she is entitled to statutory damages under RESPA because Wells Fargo
10 engaged in a “pattern or practice of noncompliance” in violation of section 2605.² Docket No. 41, FAC
11 ¶ 68. Plaintiff pleads five alleged instances where Wells Fargo failed to respond to a QWR, three relating
12 to her and two relating to her neighbor, Dennly Becker. *Id.* ¶¶ 68-71.

13 To recover statutory damages, a plaintiff must plead a pattern or practice of noncompliance with
14 RESPA. *See* 12 U.S.C. § 2605(f) (1)(b). Under section 2605(e), a loan servicer has an obligation to act
15 when it receives a QWR from the borrower or borrower’s agent “for information relating to the servicing
16 of [the] loan.” 12 U.S.C. § 2605(e)(1)(A). For example, information requested from the servicer about
17 the validity of the loan does not create an obligation for a servicer to respond. *See Tamburri v. Suntrust
18 Mortgage, Inc.*, 875 F. Supp. 2d 1009, 1014 (N.D. Cal. 2012).

19 Plaintiff does not sufficiently allege facts to show that her information requests on November 6,
20 2013 and December 6, 2013 related to the servicing of her loan. Plaintiff only states that on November
21 6, 2013 she was “seeking information” and on December 6, 2013 she was “seeking specific information
22 concerning her primary home loan.” Docket No. 41, FAC ¶¶ 70-71. She also does not explain what
23 Dennly Becker requested from Wells Fargo. In order to plead a “pattern or practice” violation plaintiff
24 first needs to allege that the requests concerned information regarding the serving of the loans that would
25 obligate Wells Fargo to respond.

26

27

28 ² The parties’ papers do not address these allegations. The Court finds it appropriate to review
these allegations *sua sponte* in light of the fact that the Court will grant plaintiff one final opportunity
to attempt to cure the deficiencies of the complaint.

1 Accordingly, the Court dismisses plaintiff's RESPA claim with leave to amend consistent with
2 the terms of this order.

3

4 **II. Fraud**

5 Plaintiff alleges that Wells Fargo's June 24, 2013 letter contained several misrepresentations,
6 including the statement that plaintiff's June 13, 2013 letter was "more of an attempt at discovery" than
7 a qualified written request under RESPA, as well as a "misrepresentation by omission" because Wells
8 Fargo did not tell plaintiff that Section 2605 allows borrowers to seek specific information. Docket No.
9 41, FAC ¶¶ 76-78. Plaintiff also alleges the statement in the letter to the effect that "any document or
10 requested information not provided in this letter is due to the request being too broad to determine the
11 specific information needed, or are considered to be proprietary information," is fraudulent, because her
12 request was specific. *Id.* ¶¶ 79-80.

13 Defendant contends that the fraud claim should be dismissed because plaintiff has not alleged the
14 elements of fraud, nor has she alleged those elements with particularity as required by Federal Rule of
15 Civil Procedure 9(b). A claim for fraud must have the following elements: "(1) a misrepresentation (false
16 representation, concealment, or nondisclosure); (2) knowledge of falsity (or 'scienter'); (3) intent to
17 defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." *Anderson v. Deloitte*
18 & *Touche*, 56 Cal. App. 4th 1468, 1474 (1997) (citation omitted); *see also In re Glenfed, Inc. Sec. Litig.*,
19 42 F.3d 1541, 1548 (9th Cir. 1994) ("[A] plaintiff must set forth what is false or misleading about a
20 statement, and why it is false."). "Rule 9(b)'s particularity requirement applies to state-law causes of
21 action." *Vess v. Ciba-Geigy Corp. USA*, 317 F. 3d 1097, 1103 (9th Cir. 2003). To satisfy Rule 9(b)'s
22 heightened pleading standard, "[a]verments of fraud must be accompanied by the 'who, what, where, and
23 how' of the misconduct charged." *Id.* at 1106 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.
24 1997)).

25 The Court concludes that plaintiff's fraud allegations are deficient. To support fraud, an "alleged
26 misrepresentation must ordinarily be an affirmation of past or existing facts." *Glen Holly Entertainment,*
27 *Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1093 (C.D. Cal. 1999); *see Gentry v. eBay, Inc.*, 99 Cal.
28 App. 4th 816, 835 ("expressions of opinion are not generally treated as representations of fact, and thus

1 are not grounds for a misrepresentation cause of action"). Here, plaintiff alleges that Wells Fargo's
2 characterization of her requests as "too broad" and calling for "proprietary" information was fraudulent.
3 However, these statements are more akin to opinions than statements of fact and thus cannot support a
4 fraud claim. Further, "[t]he alleged misrepresentation must also ordinarily be a specific factual assertion;
5 generalized statements are usually not actionable as fraud. . . ." *Glen Holly Entertainment*, 100 F. Supp.
6 2d at 1093.

7 In addition, even if the challenged statements or the failure to inform plaintiff that she had a right
8 to request specific information under RESPA could provide the basis for a fraud claim, plaintiff does not
9 allege any facts regarding Wells Fargo's knowledge or intent to defraud. Plaintiff simply alleges that
10 Wells Fargo employee Nicole Adams "knew or should have known" that the information plaintiff
11 requested was specific and not too broad or proprietary to Wells Fargo, and that Wells Fargo intended
12 to defraud her because the letter was "cleverly crafted." Docket No. 41, FAC ¶¶ 84, 85. These
13 allegations are too vague to support a fraud claim.

14 Finally, the FAC does not adequately allege damages for the reasons discussed above. Plaintiff
15 alleges that she relied on Wells Fargo's representations and did not demand that Wells Fargo provide the
16 written itemizations, and that as a result of the failure to provide that information, the private investor
17 decided not to give her a \$50,000 loan. Docket No. 41, FAC ¶ 87. Plaintiff does not explain why the
18 lender needed the itemizations, why she never followed up with Wells Fargo to obtain them, or why the
19 Notice of Default and Notice of Trustee's Sale was insufficient.

20 The Court concludes that plaintiff cannot cure these deficiencies and DISMISSES the fraud claim
21 without leave to amend.

22

23 III. Negligence

24 Plaintiff alleges a claim for negligence and negligent infliction of emotional distress. FAC ¶¶ 91-
25 106. Plaintiff predicates her claim on violations of RESPA, California Civil Code section 1711, and the
26 Home Owners' Loan Act ("HOLA"). *Id.* The alleged RESPA violations are detailed *supra*. With regard
27 to section 1711, plaintiff alleges that defendant violated that statute by sending her "a letter that contained
28 misrepresentations and was deceitful." *Id.* at ¶ 97. Plaintiff alleges that HOLA preempts California law,

1 and thus that defendant violated HOLA by attempting to non-judicially foreclose on her home pursuant
2 to California Civil Code section 2924. *Id.* at ¶ 101.

3 To state a claim for negligence a party must plead (1) a legal duty to use due care; (2) a breach
4 of that duty; and (3) the breach as the proximate or legal cause of the resulting injury. *See Merrill v.*
5 *Navegar, Inc.*, 26 Cal. 4th 465, 477 (2001). Defendant contends that plaintiff's negligence claim fails
6 because “[t]o the extent Plaintiff is trying to establish a duty of care based on RESPA, i.e., as some type
7 of negligence per se argument, the fact that she has not adequately alleged a RESPA violation . . . is fatal
8 to this claim.” Docket No. 44 at 10:9-12. For the reasons stated *supra*, the Court agrees.

9 The Court also finds that plaintiff cannot predicate her negligence claim on an alleged violation
10 of California Civil Code section 1711. Section 1711 states, “One who practices a deceit with intent to
11 defraud the public, or a particular class of persons, is deemed to have intended to defraud every
12 individual in that class, who is actually misled by the deceit.” Cal. Civ. Code § 1711; *see also Cohen*
13 *v. Citizens Nat. Trust & Sav. Bank*, 143 Cal. App. 2d 480, 486 (1956) (“ . . . it is apparent that the
14 legislature intended merely to grant relief to those relying upon statements in advertisements or
15 communicated by means of other mass media. In other words, statements which the speaker or writer
16 intends to reach a considerable number of persons and cause reliance by a class or the public.”). Plaintiff
17 does not allege any deceitful statements that defendant made to the public, nor could she based upon the
18 facts alleged in the FAC.

19 The Court also concludes that to the extent the negligence claim is based on HOLA, the claim
20 fails as a matter of law. Plaintiff alleges that HOLA preempts California law, and thus that defendant
21 violated HOLA by attempting to non-judicially foreclose on her home pursuant to California Civil Code
22 section 2924. Docket No. 41, FAC ¶¶ 101-106. However, as the Court has noted in a previous order,
23 plaintiff misunderstands case law regarding HOLA preemption. The cases cited by plaintiff do not hold
24 that banks may not proceed with non-judicial foreclosures in California, and to the contrary, numerous
25 courts have upheld California's non-judicial foreclosure statute. *See e.g., Charmicor v. Deaner*, 572 F.2d
26 694 (9th Cir. 1978). The cases plaintiff cites simply hold that a homeowner may not bring a claim
27 alleging violations of sections of the non-judicial foreclosure statute because those claims are preempted
28 by HOLA. *See e.g., Giordano v. Wachovia Mortg., FSB*, No. 5:10-cv-04661-JF, 2010 WL 5148428, at
*4 (N.D. Cal. Dec. 14, 2010).

1 Thus, to the extent plaintiff's negligence claim is predicated on violations of California Civil
2 Code section 1711 and HOLA, it is dismissed without leave to amend. To the extent plaintiff's
3 negligence claim is predicated on a violation of RESPA, it is dismissed with leave to amend.

4

5 **IV. Intentional Infliction of Emotional Distress**

6 Plaintiff alleges a cause of action for intentional infliction of emotional distress ("IIED"). Docket
7 No. 41, FAC ¶¶ 107 -121. Plaintiff bases her IIED claim on defendant's alleged violations of RESPA
8 and HOLA, as well as fraud.

9 The elements of the tort of intentional infliction of emotional distress are: (1) extreme and
10 outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability
11 of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3)
12 actual and proximate causation of the emotional distress by the defendant's outrageous conduct. *Hughes*
13 *v. Pair*, 46 Cal. 4th 1035, 1050 (2009) (citing *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965
14 (1993)).

15 The Court concludes that plaintiff's IIED claim fails as a matter of law. In order to successfully
16 plead an IIED claim the alleged conduct must be so outrageous "as to exceed all bounds of that usually
17 tolerated in a civilized community." *Hughes*, 46 Cal. 4th at 1050. Plaintiff bases her RESPA and fraud
18 claims on defendant's failure to adequately respond to her QWR. Docket No. 41, FAC ¶¶ 109-116. Even
19 if the RESPA and fraud claims were properly pled, defendant's conduct is not outside "all bounds usually
20 tolerated by a decent society" as required to plead a claim of IIED. *See Hughes*, 46 Cal. 4th at 1050; *see also Davenport v. Litton Loan Servicing, LP*, 725 F. Supp. 2d 862 (N.D. Cal. 2010) (holding that a loan
21 servicer's alleged failure to send foreclosure notices does not qualify as outrageous conduct or even
22 indicative of bad faith). Further, as discussed above, defendant did not violate HOLA by non-judicially
23 foreclosing, and therefore this conduct cannot be classified as outrageous. Accordingly, the Court
24 dismisses plaintiff's intentional infliction of emotional distress claim without leave to amend.

26

27 **V. Unfair Competition**

28 Plaintiff alleges a claim of unfair competition pursuant to California Civil Code section 17200.

1 Docket No. 41, FAC ¶123. Plaintiff predicates her section 17200 claim on the alleged violations of (1)
 2 RESPA; (2) fraud on the public pursuant to California Civil Code 1711; (3) negligence pursuant to
 3 California Civil Code section 1714³; and (4) intentional infliction of emotional distress. *Id.* Defendant
 4 argues that this claim fails for the same reasons that the underlying claims are deficient. Defendant
 5 additionally argues that plaintiff has not properly pled an injury-in-fact to support her claim.

6 To establish a violation of section 17200, a plaintiff may plead a violation based on any unlawful,
 7 unfair or a fraudulent business act or practice. Cal. Bus. & Prof. Code § 17200. To plead a cause of
 8 action based on an “unlawful” business act or practice under the UCL, a plaintiff must allege facts
 9 sufficient to show a violation of some underlying law. *People v. McKale*, 25 Cal.3d 626, 635 (1979);
 10 *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). A plaintiff must also establish
 11 an “injury in fact” and have “lost money or property *as a result of* such unfair competition” to have
 12 standing to pursue a claim under section 17200. *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 338
 13 (2011) (emphasis added). “The phrase ‘as a result of’ in its plain and ordinary sense means ‘caused by’
 14 and requires a showing of a causal connection or reliance on the alleged misrepresentation.” *Id.* at 326
 15 (internal quotation marks and citation omitted).

16 Plaintiff’s unfair competition claim fails for two reasons. First, the Court has dismissed all of the
 17 underlying claims, some with limited leave to amend (RESPA and the negligence claim to the extent it
 18 is based on a RESPA violation) and others without leave to amend (Cal. Civ. Code § 1711, balance of
 19 the negligence claim, and intentional infliction of emotional distress). Second, to establish injury-in-fact
 20 plaintiff must show a causal connection between the unlawful act and the injury. Plaintiff has not
 21 sufficiently pled a connection between the loss of the \$50,000 loan and the alleged wrongful acts by
 22 defendant. Accordingly, the Court dismisses plaintiff’s unfair competition claim with limited leave to
 23 amend to sufficiently allege the predicate RESPA claim.

24

25

26

27 ³ The FAC alleges that defendant violated California Civil Code section 1714. Docket No. 41,
 28 FAC ¶126. California Civil Code section 1714 pertains to liability for furnishing alcoholic beverages
 to minors. *See* Cal. Civ. Code § 1714. However, the FAC also states that “the particularities of the
 unlawful acts are contained in claim three,” and thus for the purposes of this analysis, the Court assumes
 plaintiff meant to refer to the negligence claim alleged in the third claim.

CONCLUSION

2 For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendant's
3 motion to dismiss with limited leave to amend. **Should plaintiff choose to file an amended complaint,**
4 **it shall be consistent with the terms of this order and must be filed on or before March 13, 2014.**

IT IS SO ORDERED.

8 | Dated: February 26, 2014

Susan Illston
SUSAN ILLSTON
UNITED STATES DISTRICT JUDGE